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# in the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-724

MARTIN SKLAROFF,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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UNITED STATES OF AMERICA,

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

The Petitioner, Martin Sklaroff, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 30, 1971.

## OPINION BELOW

The opinion rendered in this matter by the United States Court of Appeals for the Fifth Circuit, not yet reported, appears in the Appendix hereto and is designated as Appendix "A".

The petition for rehearing filed by the Defendant Sklaroff was denied on November 1, 1971. A copy of said denial of the petition for rehearing is attached hereto as Appendix "B". No opinion was rendered by the District Court for the Southern District of Florida.

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered on September 30, 1971. A timely petition for rehearing was denied on November 1, 1971, and this petition for certiorari was filed within 30 days of that date. The Court's jurisdiction is invoked, under 28 U.S.C. Sec. 1254(1).

## QUESTIONS PRESENTED

1. Whether in view of the decisions in *Marchetti v. United States*, 390 U.S. 39 (1968) and *Grosso v. United States* 390 U.S. 62 (1968), evidence obtained as a result of a pre*Marchetti-Grosso* search by a warrant predicated on allegations relating to violations of the Wagering Tax Act, should have been excluded after proper objection on Fourth and Fifth Amendment grounds, in a criminal prosecution under 18 U.S.C. 1084 and 1952.

2. Whether the Court's restrictions during the "Alderman" hearing regarding the discovery of the Government's illegal bugging activities, were error in view of the resultant inability of the Defendants to ascertain taint.

## STATUTORY PROVISIONS INVOLVED

Fourth Amendment to
the Constitution of the United States

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to
the Constitution of the United States

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in a land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

## STATEMENT OF THE CASE

Petitioner Martin Sklaroff and Morton Kane were found guilty on March 22, 1967 of Counts I and IV of an Indictment under which they were being tried, charging conspiracy to violate Title 18, United States Code, Section 1084 and using telephones in interstate commerce to promote gambling in violation of Title 18, United States Code, Section 1952. As part of the Government's proof that the Defendants Sklaroff and Kane committed the crimes of which they were convicted, certain evidence was introduced during the course of the trial obtained as a result of a search warrant issued on March 26, 1965.

To obtain this search warrant, on the 26th day of March, 1965, Francis C. Smith, Special Agent Internal Revenue Service, and Edwin J. Sharp and Warren Welsh, Special Agents, Federal Bureau of Investigation, filed affidavits for search warrants before the United States Commissioner for the Southern District of Florida. These affidavits contained allegations relating to violations of the Wagering Tax Act and were directed against the premises occupied by Morton P. Kane. As a result of these affidavits the United States Commissioner, Edward Swann, issued a search warrant for the premises occupied by Morton Kane. This warrant directed seizure of items intended to be used in violation of Sections 4411, 4412, 4901(a) and 7203 of the Internal Revenue Code of 1954 (Wagering Tax Offenses).

Upon entering the premises Agent Smith, with other agents of the Internal Revenue Service, found Morton P.

Kane and Martin Sklaroff on the premises with other people. The Defendants Sklaroff and Kane, and the premises, were searched and certain items were seized.

Some of the items seized as a result of this search were admitted into evidence at the original trial of this case on March 16, 1967. These were Government Exhibits 65, 66, 90 and 91, admitted through the testimony of Special Agent Smith. At the trial, Special Agent Smith was also allowed to testify that he had been assigned to special duties for the last 3 or 4 years on the wagering tax squad, and that those duties primarily consisted of seeking out violations of the Wagering Tax Laws. Agent Smith also identified Martin Sklaroff and Mr. Kane as being those persons who were on the premises at the time of his search conducted on March 27, 1965. Smith further testified that the telephone number connected with the premises where Kane and Sklaroff were found was 751-1608.

The testimony of Agent Smith thus laid the foundation for the testimony of Wanda Lou Irving, Thomas L. Carney, George Brouebake, and the introduction of Government Exhibits 92, 93 and 94.

As a result of the testimony of these witnesses and the exhibits, the Government was able to show that Sklaroff and Kane were connected with credit cards issued in fictitious names and used by the Defendants for long distance calls in violation of Title 18, United States Code, Section 1952; that they were in the business of betting or wagering in violation of the same statute; and further that there was an illegal agreement between them in violation of Title 18, United States Code, Section 371.

The Government in this case also introduced over Defendant's objections on Fifth Amendment grounds the original income tax returns for Martin Sklaroff and his wife for the years of 1963 through 1965, Government Exhibits 4, 7 and 8. These exhibits reflected that gambling was one of the major sources of Sklaroff's income in the years 1963 through 1965 and also showed a payment of $62.50 for the gambling stamp tax license in 1965.

In closing argument, the Government relied, inter alia, upon the Defendant's tax returns to show their source of income from gambling, the records seized on March 27, 1965, and Mr. Sklaroff's fingerprint on a certain envelope which was predicated on the testimony of Agent Smith, as to his raid on March 27, 1965, connecting telephone number 751-1608 to the premises. Moreover, the Government's trial brief stated that the tax returns would be used to show proof of business enterprise in the business of betting and wagering.

## REASONS FOR GRANTING WRIT

### I

WHETHER IN VIEW OF THE DECISIONS IN *MARCHETTI v. UNITED STATES* 390 U.S. 39 (1968) AND *GROSSO v. UNITED STATES* 390 U.S. 62 (1968), EVIDENCE OBTAINED AS A RESULT OF A PRE-*MARCHETTI-GROSSO* SEARCH BY A WARRANT PREDICATED ON ALLEGATIONS RELATING TO VIOLATIONS OF THE WAGERING TAX ACT, SHOULD HAVE BEEN EXCLUDED AFTER PROPER OBJECTION ON FOURTH AND FIFTH AMENDMENT GROUNDS, IN A CRIMINAL PROSECUTION UNDER 18 U.S.C. 1084 and 1952.

In the instant case, the court below held that evidence obtained in violation of the Defendant's constitutional rights as set forth in *Marchetti* and *Grosso*, could nonetheless be admitted in their trial, notwithstanding proper objection to such admission on Fifth Amendment grounds. This decision is in conflict with the ruling of this Honorable Court in *Lookretis v. United States*, 390 U.S. 338 (1968). As in *Lookretis* (see *United States v. Lookretis*, 398 F.2d 64), evidence in the instant case was obtained against the Petitioner as a result of his non-compliance with the Federal Tax Statutes for the years 1963 and 1964. Further, evidence was admitted at trial which was obtained directly or indirectly through the disclosures by the Petitioner Sklaroff compelled by his compliance with the said Statute in the year 1965.

Shortly after its decisions in *Marchetti* and *Grosso* this Court granted certiorari in *Rainwater v. Florida* 390 U.S. 196 (1968). As in *Lookretis*, the Supreme Court vacated the decision and remanded the case for further consideration in light of *Marchetti v. United States, supra*. In *Rainwater v. Florida, supra* the evidence was obtained by Federal officers pursuant to a Federal search warrant. This evidence was the basis for a Federal prosecution which was later abandoned. The evidence thus obtained was turned over to State authorities and the Third District Court of Appeals of Florida held it to be admissible in evidence on the State charge. See *Rainwater v. State*, 186 So.2d 278 (Fla. 3rd Dist., 1966). After the Supreme Court vacated and remanded the case, the Third District vacated their previous judgment and reversed the judgment of the Criminal Court of Record In and For Dade County, Florida, with directions to the Criminal Court to grant a new trial, *Rainwater v. State*, 208 So.2d 865 (Fla. 3rd Dist. 1968).

Thus, in both the *Lookretis* and *Rainwater* cases, evidence obtained by Federal agents based upon wagering tax violations was not allowed to be used to prosecute and convict defendants of other State and Federal crimes.

Also, Petitioner's 1965 tax return was used against him over objection on Fifth Amendment grounds to show his purchase of a gambling tax stamp license.

The instant case is unlike the situation affirmed by this Honorable Court in *Mackey v. United States*, ___ U.S. ___, 91 S.Ct. 1160; 28 L.Ed.2d 404 (1971), wherein *Marchetti* and *Grosso* were not held retroactive to the use of wagering excise tax returns in a criminal prosecution.

Petitioner contends that Mr. Justice Harlan's opinion in the *Mackey* decision is of substantial importance since the instant case appears before this Honorable Court on direct review and is not a collateral attack on the conviction. Further, the instant case has far greater prejudice to the Petitioner than the mere use of the excise tax returns in evidence, since substantial other testimony and evidence used to convict the Petitioner was introduced over objections on the Fifth Amendment. This evidence was all obtained as a result of the Petitioner's failure to comply with the Wagering Tax Law.

## II

## WHETHER THE COURT'S RESTRICTIONS DURING THE "ALDERMAN" HEARING REGARDING THE DISCOVERY OF THE GOVERNMENT'S ILLEGAL BUGGING ACTIVITIES, WERE ERROR IN VIEW OF THE RESULTANT INABILITY OF THE DEFENDANTS TO ASCERTAIN TAINT.

The Petitioner's argument regarding this question of law is being set forth by the co-petitioner, Martin Kane in his Petition for Certiorari to be filed in this Court on or before December 8, 1971. Martin Kane was the co-defendant with the Petitioner Sklaroff in the trial of this case and was also a co-appellant on the appeal before the Fifth Circuit Court of Appeals. The Petitioner Martin Sklaroff respectfully adopts (as was done in the appeal in the Fifth Circuit) all arguments raised by the Petitioner Martin Kane in his Petition for Certiorari, arising out of the same decision from which the instant Petition stems.

## CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of _____, 1971, a copy of the above Petition for Writ of Certiorari was mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. and to Robert W. Rust, Office of the United States Attorney, Miami, Florida.

I FURTHER CERTIFY that all parties required to be served have been served.

_____

JAMES J. HOGAN

## APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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**No. 29200**

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

MORTON PAUL KANE and MARTIN SKLAROFF,
Defendants-Appellants.

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**Appeals from the United States District Court for the Southern District of Florida**

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(September 30, 1971)

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Before BELL, THORNBERRY and CLARK,
Circuit Judges.

CLARK, Circuit Judge: Morton Paul Kane and Martin Sklaroff were convicted by a jury in the United States District Court for the Southern District of Florida on March 22, 1967, of violating 18 U.S.C.A. § 1952 (1970) [conducting gambling-connected telephone communications

between Miami, Florida and Louisville, Kentucky], and of conspiracy to violate § 1952 and 18 U.S.C.A. § 1084 (1966) [transmission of bets and wagers by a wire communication facility in interstate commerce]. Kane was sentenced to concurrent five-year terms; Sklaroff was sentenced to concurrent two-year terms. On appeal, this Court, without reaching the merits, vacated the judgments and sentences and remanded the cause for further proceedings in light of Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). Kane v. United States, 409 F.2d 847 (5th Cir. 1969).

Pursuant to our mandate, the district court conducted an Alderman hearing and at its conclusion determined that the evidence utilized to convict the defendants was not tainted by illegal electronic surveillance. After the judgments of conviction and the sentences were reimposed, Kane and Sklaroff moved for new trials. The district court refused to pass on these motions on the ground that it had no jurisdiction to hear a motion for a new trial on this remand. The pending second appeal presents for decision the issues raised by the Alderman hearing, the seven original issues, and two additional issues on the merits not raised in the original request for review.[1]

## THE ALDERMAN HEARING

In 1961 the Federal Bureau of Investigation (FBI) and the Internal Revenue Service began a massive five-year investigation of gambling operations in the Miami,

[1]A third defendant, Gilbert Lee Beckley, was involved in the original appeal and was similarly resentenced on remand. His appeal from such resentencing was dismissed in a prior order. His rights are not involved here.

Florida area. As a part of this in depth inquiry, the premises of certain suspected gamblers were placed under a form of electronic surveillance, known in the vernacular as "bugging". This involved placing microphone gear in the premises which would pick up and transmit words spoken there. No attachments were made to any telephones, therefore, only the conversation of the persons on the premises were overheard or recorded. The evidence reveals that no surveillance was intended to be made of either Kane or Sklaroff directly, rather they happened to be parties to conversations monitored on the bugged premises of Frank Rosenthal and Edward McGrath. The Government admits that these buggings were illegal; the question for the court below in the Alderman hearing was whether the evidence gathered by these illegal listening devices tainted the convictions of Kane and Sklaroff.

Prior to the hearing, at the direction of the court, the Government made available to the defendants transcriptions of recorded conversations, called logs, in which the defendants were known to have been overheard. The Government also furnished logs to the defendants which disclosed instances where no words of either defendant were known to have been overheard but where one of the defendants may have been the party on the other end of the telephone. All other logs obtained by monitoring the Rosenthal and McGrath premises which were arguably relevant to this case, but not furnished to the defendants, were turned over to the trial judge for an in camera determination as to whether the Government had furnished all logs to the defendants as they had any right to review under the standards of Alderman. In addition to having such of the logs as were made available to them at the hearing to

demonstrate taint, the defendants were allowed to question three FBI agents and one former agent who had gathered evidence for this prosecution, to determine whether their information as to defendants' activities came from electronic surveillance records or from independent, untainted sources.

During the course of the hearing the defendants moved to require the Government to produce additional items from its files. Their requests covered an administrative review file, such of the logs examined in camera by the court as contained references to "unknown" voices, physical surveillance notes of the FBI, and its interoffice memoranda called airtels. In opposition to this discovery the Government argued that no administrative review file had ever existed; that logs containing "unknown" voices could not possibly have yielded evidence that was used against the defendants or, alternatively, that the defendants did not have the requisite standing to demand the production of such "unknown" voice logs; and that the production of surveillance notes or airtels would be extremely burdensome to the Government, would be useless to the defendants, would constitute rummaging through Government files, and would go beyond the requirements of Alderman. The trail court denied the defendants' discovery motion in toto, based on the findings set out in the margin.[2]

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[2] 1. Defendants claim no standing to any premises.

2. Defendants claim no standing to any specific additional conversations.

3. Mere presence on electronically surveilled premises, without more, affords no standing. United States v. Cavello, 410 F.2d 563 (2 Cir. 1969).

4. The United States delivered to this Court all extant recordings or transactions of recordings of electronic installations disclosed in its

On the present appeal Kane and Skarloff specifically contend that the logs examined in camera should have been made available to the defendants for their inspection to determine relevancy, and the district court should have granted their motion for discovery of the additional government documents.

a. In Camera Procedures

In order to establish a right to review illegally recorded government records under Alderman, the proof

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pre-trial memorandum which the Court has examined, in camera, and determined that the United States has furnished defendants all recordings and transcriptions of conversations to which defendants have standing. Taglianetti v. United States, 394 U.S. 316 (1969).

5. The United States has no additional logs reflecting the presence of either of the defendants on premises which were subject to electronic installations.

6. There are no inter-office memoranda among the various agents reflecting additional electronic monitoring to which defendants have standing.

7. None of the Government's evidence supporting the convictions of defendants herein was the product of electronic surveillance reflected in the records furnished defendants. Further, nothing appears in defendants' motions, memoranda, or testimonial evidence to indicate any such taint.

8. The recordings of the Bubis telephone conversations admitted in evidence at the trial were not the product of illegal electronic monitoring. Hanna v. United States, 393 F.2d 700, 401 F.2d 405 (5 Cir. 1969), cert. den. 391 U.S. 1015 (1969). There is no evidence that the recordings were the product of electronic monitoring of a defendant herein for an "unreasonable" length of time and, therefore, illegal. On the contrary, the case relied upon by defendants held that such monitoring by the telephone company for only the days here involved would have been "reasonable" and legal. Bubis v. United States, 384 F.2d 643 (9 Cir. 1967).

9. Defendants are not entitled under Alderman v. United States, supra, to disclosure of notes on physical surveillances conducted by Government agents.

10. The convictions of defendants were not tainted by the use of any evidence obtained by illegal electronic surveillance.

must show that the conversation contained the individual's own voice or that the eavesdropping occurred on the individual's own premises. A voice whose identity is not known to the listening party does not, without more, establish standing on behalf of any person. A defendant who proposes to establish that he has standing to obtain a recording containing the voice of an unknown person has the burden of producing evidence that would indicate to the judge making the in camera review that he is the unknown party whose conversation has been monitored, or that the recording came from his premises. The defendants here failed to produce such evidence. They argue that placing such a burden upon them denies due process by freighting them with an impossible requirement — one they cannot meet without an inspection of the logs themselves. Certainly this argument has plausibility if considered solely from the defendants' point of view. It is easy to conjecture that if they had full access to all government records they might, by knowing the time, place and content of certain logs which appear innocuous, establish that their voices were those which are now unknown. However, we read Alderman's definition of standing as prescribing the outer limits of a defendant's right to view illegal wiretaps. To follow the defendants' entreaties in this case would push us beyond those outer limits.[2a] If their assertions were honored, the defendants would effectively divest the court of its specifically established prerogative of determining standing.

As explicated in Taglianetti v. United States ,394 U.S. 316, 89 S.Ct. 1099, 22 L.Ed.2d 302 (1969), the problem in Alderman was that the in camera procedures described

[2a]United States v. Mirro, 435 F.2d 839. 841 (7th Cir. 1970).

there were inadequate to safeguard Fourth Amendment rights. However, these holdings make it explicity clear that Alderman did not rule all in camera proceedings deficient.[3] Here the in camera proceedings did not entail the

The route we must follow is not insensitive to the problem of safeguarding the rights of an accused from possible disingenuous assurances by the Government that it has done its duty of making available to the accused and the court all the illegal surveillance materials that are arguably relevant to the case. It recognizes that there are many means by which a Government agent committed to devious conduct may try to enshroud his illegal actions from even the most vigilant accused. For instance, the tapes could be erased and the logs burned, as soon as all relevant information had been gleaned from them. However, the balance has been struck on broader interests. The accused cannot be granted the right to rummage through the Government's files. Taglianetti, supra. We view the Alderman limits as seeking to strike a just balance between the right of a defendant to eliminate tainted evidence from his trial process with the due preservation of the right of the people to deter criminal conduct. The Court's solution is to leave to the integrity of the trial judge the duty to decide in camera only issues relating difficulties found compelling in Alderman. The record developed below demonstrates that the procedures employed by the trial court were correct.[4]

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[3] "Nothing in Alderman . . . requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance." Taglianetti, supra, 394 U.S. at 317, 89 S.Ct. at 1101. See also Nolan v. United States, 423 F.2d 1031, 1041-45 (10th Cir. 1970).

[4] See U.S. v. Clay, 430 F.2d 165, (5th Cir. 1970), rev: on other grounds, —— U.S. ——, 91 S.Ct. 2068, —— L.Ed.2d —— (1971).

to standing and to throw open to the light of adversary procedures all issues as to relevance of evidence which his informed judgment tells him the defendant has a right to review. This is the procedure designed to accord both the defendant and the people the best protections possible.

b. Production of Records

The same problem of prosecutorial good faith discussed above arises with respect to the defendants' request for surveillance notes and airtels. The trial judge required the FBI to search its files to determine whether they contained any tainted information. The argument of the defendants that this was improper necessarily asserts that they should have been allowed to search through the complete Government files which were or might have been used as a basis for investigating and prosecuting this case. This procedure has not only been negated in Taglianetti but also in Alderman when the Supreme Court held that the scope of the hearing "must be left to the informed discretion, good sense, and fairness of the trial judge." 394 U.S. at 185, 89 S.Ct. at 973. We do not believe that the trial judge abused his discretion in defining the limits of the inquiry in this case. He was in a better position than we to judge the extent of the illegal evidence and to make a determination as to whether or not further inquiry was needed to discover any extant but unrevealed illegal evidence. In other words, the trial judge was in the best position to get a "feel" for the case in terms of defining the scope of the hearing. The trial judge could properly take into account the ample opportunity the defendants had to probe the source of those items of evidence offered to convict them and the plausibility of the Government's ac-

count of the independent source for every such aspect of the evidence. See Baker v. United States, 430 F.2d 499 (D.C. Cir. 1970).

The 7th Circuit is in agreement with our conclusion. United States v. Hoffa, 436 F.2d 1243 (7th Cir. 1970). Hoffa argued that the trial court erred in denying the production of similar airtels. The 7th Circuit held that although Alderman required all surveillance records to which a defendant has standing be turned over to him without in camera screening, disclosure was limited to those materials only. It was further determined that the district court acted within the ambit of its discretion in ruling that the defendant neither needed nor was entitled to anything more than the specified conversations which were produced and examined.

Defendants have called to our attention the recent case of United States v. Alderisio, 424 F.2d 20 (10th Cir. 1970). Prior to the hearing, the Government turned over to Alderisio all logs to which he had Alderman standing. In addition, the Government furnished to Alderisio some airtel summaries of original logs which contained conversations not noted or transcribed in the corresponding logs. Alderisio argued that these airtels showed the Government's asserted disclosure of complete records (logs, airtel excerpts, and one complete airtel) did not satisfy the Alderman disclosure requirement. A defense request for amplified scrutiny of FBI files was denied by the district court. The 10th Circuit did order the cause remanded, but only for the limited purpose of requiring the court to make an in camera comparison of all airtels with the relevant logs to determine if the Government had disclosed all extant surveillance materials. The appellate court

did not order that any additional surveillance material be made available to the defendant. Rather, the rationale of Alderisio is that the issue of "completeness" should be decided by the court in camera and only in the event that the district court should hold that the Government had failed to ful[illegible] could the defendant obtain and review the und[illegible]rtels and logs for relevancy. There is no issu[illegible] completeness" in the case at bar. Our holding is [illegible]istrict judge should rule on questions of standing in camera before the defendants are allowed to determine relevancy. Thus it appears that the Alderisio case supports rather than detracts from the vitality of our holding.[4a]

We conclude that the district court did not err in limiting the scope of the hearing both as to production of the logs in question and the airtels and surveillance notes. We have received the finding of the district court that the convictions were not tainted by illegal evidence and determine that finding to be clearly correct. In addition, we agree with the district court that it had no jurisdiction to consider motions for new trial. Such consideration would have been contrary to the limited purposes of the remand mandate. Finally, the defendant Kane argues that the trial judge erred in not requiring a pre-sentence report to be submitted prior to the entry of sentence. On this record, we perceive no abuse of discretion. See United States v. Hutul, 416 F.2d 607, 627 (7th Cir. 1969); King v. United States, 410 F.2d 1127 (9th Cir. 1969). No prejudice can be shown since the trial judge heard evidence as to all of the mitigating circumstances. Then too it must be noted that even the present sentences are not beyond correction or reduction. See Fed.R.Crim.P. 35.

[4a]See, Mirro, supra n. 2a at 841.

## THE SEVEN ORIGINAL ISSUES

In the original appeal, defendants raised the seven issues set out and numbered in the margin.[5] On the present appeal, the court has only heard arguments of counsel on the *Alderman* issue, discussed above, and on the newly raised issues discussed in the final section of our opinion here. As to the issues presented on the former appeal, we have determined that oral argument is not necessary.[6] Our discussion of the *Alderman* hearing is dispositive of Issue 5 and the question of the Rosenthal bug in Issue 4. Issues

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[5]1. It was error to receive in evidence the tape recordings of the conversations overheard on the Bubis wiretap.

2. The Wall testimony, being entirely dependent upon an identification made through the Bubis tapes, was thus tainted by the illegal wiretap and should have been excluded, as should, consequently, all of the credit card evidence of which the Wall testimony was the cornerstone.

3. The Hanna search warrant was admittedly based on information from the illicit Hanna wiretap, so that the receipt in evidence of the material seized under that warrant was error.

4. The warrants for all the other coordinated Miami searches were based on information from the Hanna wiretap and the illegal Rosenthal bug, so that the receipt in evidence of the material seized under all of the said warrants was error.

5. Assuming arguendo that the record does not disclose such taint of the evidence by illegal eavesdropping as to require reversal of the convictions, reversal is nevertheless required because of the erroneous restrictions imposed on pretrial and voir dire inquiry into the government's illegalities.

6. The FBI's four hours of telephone answering in one of the raided premises was an unconstitutional search, so that it was error to receive the testimony of Agent Scranton as to the contents of the communications taken through that search.

7. The government's charts purportedly summarizing the evidence were improper under this Court's standards and should have been excluded from evidence.

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[6]Rule 18, 5th Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of N.Y., et al., 431 F.2d 409, Part I (5th Cir. 1970).

1-4 are concerned with the so-called Hanna and Bubis tapes. These tape recordings came into existence when two different telephone companies tapped into two telephone lines which they had reason to believe were being used fraudulently. A description of the circumstances under which the Hanna recordings were made and the establishment of their legality is contained in Hanna v. United States, 404 F.2d 405 (5th Cir. 1968). Based upon this precedent, Issue 3 and the remainder of Issue 4 are without merit. However, Issues 1 and 2, involving the admissibility of the Bubis tapes themselves and testimony dependent upon evidence obtained from such tapes, call for some discussion. The 9th Circuit in Bubis v. United States, 384 F.2d 643 (9th Cir. 1967) ordered the use of these tapes suppressed in the trial of Bubis on the ground that they covered three months of wiretapping by the telephone company and that this period constituted such an unreasonable amount of time for the telephone company to ascertain whether or not Bubis was making long distance calls without paying the tolls, that its use in a criminal proceeding could not be condoned. It does not follow, however, that the portion of these same tapes introduced in the instant trial should have been suppressed. Assuming, without deciding for this Circuit, that we would hold three months to be such an unreasonable amount of time for a private company to monitor equipment it believed was being misused and that we would bar the use of such monitoring in a criminal case, we decline to hold that all use of the tapes so obtained would be proscribed. Only the first four days of the Bubis wiretapping was utilized in the trial below. Certainly it would be inconsistent to assert that the court must refuse to consider evidence gathered in four days of wiretaping as unreasonably intrusive and at the same time hold, as we did, that six weeks was not an un-

reasonable period for the company to monitor Hanna's telephone. We limit our ruling here to holding that without regard to whether the subsequent activities in Bubis' case were reasonable, such subsequent wiretapping does not preclude use of the tapes recorded during the first four days of that period. In addition, it should be borne in mind that we consider the issue as it relates to the defendants here and not to Bubis himself because, at best, these defendants possess doubtful standing to protest to the unreasonableness of the wiretapping since only the voice of the non-appealing defendant, Beckley, was overheard in the four-day period used here.[7] We conclude that it was not error to admit the Bubis tapes as against these defendants.

Issue 6 asserts that the action of an FBI agent in answering the telephone on one of the raided premises and posing as a bookie constitutes a search proscribed by the Fourth Amendment and violates 47 U.S.C.A. § 605 (1962). The agent was properly on the premises pursuant to a valid search warrant. Gambling paraphernalia described in the warrant was seized and defendant Sklaroff was arrested. However, for four hours following the raid the agent answered the telephone, taking bets and dispensing gambling information. At trial he was allowed to testify as to the contents of the calls.

United States v. Pasha, 332 F.2d 193 (7th Cir. 1964) is dispositive of the statutory point, and we deem further discussion unnecessary. The constitution question, however, is not so easy. Pasha appears to be the only case dealing with the issue that is squarely in point on the facts.

[7] See Alderman, supra, Part I, 394 U.S. at 171-173.

In summary fashion, Pasha relied exclusively upon the holding in Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928) that "telephone conversations intercepted by police officers were not protected by the Fourth and Fifth Amendments to the Constitution." 332 F.2d at 197, The holding in Olmstead has, of course, been overruled by Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967). Katz does not however, necessarily control this case. The thrust of Katz was to dispel the notion that in order for Fourth Amendment guarantees to arise there must be a trespass upon a constitutionally protected area. It emphasized that a person's expectation of privacy is the compelling consideration. Unlike Katz, the defendants here were not being overheard. Therefore, they could not have had an expectation of privacy as to a conversation in which they did not participate. In addition it is important to note that the agent never impersonated the defendants, and the testimony does not show that any caller was under the misapprehension that he was speaking to one of the defendants. The defendants cannot claim someone else's right of privacy.

The evidence gleaned from the telephone calls is analogous to the seizure of evidence not described in a search warrant. Evidence not described in a valid search warrant but having a nexus with the crime under investigation may be seized at the same time the described evidence is seized. Bryant v. United States, 252 F.2d 746 (5th Cir. 1958); United States v. Bridges, 419 F.2d 963 (8th Cir. 1969); Johnson v. United States, 293 F.2d 539 (D.C.Cir. 1961). The test is whether the agent had probable cause to "believe that the evidence sought will aid in a particular apprehension or conviction." Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 307, 87 S.Ct. 1642, 1650,

18 L.Ed.2d 782 (1967). Of course the warrant here could not have described any words to be seized from telephone calls that had not yet been made, but, with equal certainty, an agent in these circumstances had probable cause to believe that other evidence of gambling could be obtained by answering a ringing telephone in premises that had already yielded warrant authorized evidence of gambling. We should not be understood as holding this was not a form of search which must be tested by Fourth Amendment standards of reasonableness. What we find is that under these circumstances this search did not exceed those standards. The officer had a duty to gather and preserve this contemporaneous evidence of criminal activity occurring in his presence. If a number of the calls had been innocent calls or if the search had been conducted for a prolonged period of time, then the standards of reasonableness could be transgressed. But the record before us shows the agent received no innocent calls; rather, all of the 53 calls received during the four-hour period concerned gambling. One further caveat is appropriate. We in nowise intend to trench upon the rule which holds that in every search an officer should obtain a warrant as soon as practicable. We simply cannot fault the police conduct disclosed here.

In Issue 7 the defendants concern themselves with charts prepared by the Government purporting to summarize the evidence and argue that these charts should have been excluded. We disagree. The charts were based upon competent evidence already before the jury, and the primary evidence utilized to construct the charts was available to the defendants for comparison in order that the correctness of the summary could be tested. In addition the agent who prepared the charts was available for cross-

examination. Finally the jury was given correct instructions concerning their consideration of the charts. See Gordon v. United States, 438 F.2d 858, 876-77 (5th Cir. 1971). The trial judge did not abuse his discretion in allowing these charts into evidence. See Baines v. United States, 426 F.2d 833 (5th Cir. 1970); McDaniel v. United States, 343 F.2d 785 (5th Cir. 1965)

## THE NEW ISSUES

While normally we might not permit new matters to be considered on the return of a remanded cause, especially matters which could cause prejudice by delay in their assertion, we deem it more appropriate to dispose of those raised here on their merits rather than to hold that they come too late. On this appeal, the defendants contend for the first time that a portion of the evidence admitted at trial eventuated from a search warrant issued upon probable cause that the Wagering Tax Act was being violated. This Act, of course, was found to be fatally defective on Fifth Amendment grounds. Marchetti v. United States, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968) and Grosso v. United States, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968). The defendants thus argue that Marchetti-Grosso vitiates this search warrant and precludes the introduction of any evidence gained therefrom. This contention was decided adversely to the defendants in United States v. Scaglione, ___ F.2d ___ (5th Cir. 1971) [No. 29279 July 9, 1971].

The last additional point of error urged by the defendants pertains to the admission of the defendants' income tax returns in order to show that their major source of income was gambling. Included in the returns was a

deduction for a wagering tax stamp which was couched in these words: "Stamp tax license." Defendants argue that the purchase of the stamp described was compelled in violation of their Fifth Amendment rights under the Marchetti-Grosso rationale, and thus the returns which discolsed that they bought this stamp should not have been admitted. This contention is without merit. First of all, the stamp deduction was only one item on the complete return and it was never specifically brought to the attention of the jury. The only way the jury could have been apprised of the existence of the deduction was by reading the details in the returns. Even had the jury pursued this course, we cannot say they would have concluded that the defendants were thereby stating they were gamblers. Thus our case is distinguishable from Nolan v. United States, 395 F.2d 283 (5th Cir. 1968), relied upon so heavily by the defendants. In addition, these defendants certainly were not compelled to claim a deduction for the stamp. Their action in doing so was voluntary and was in no way compelled by law. Defendants are not constitutionally excused from any resulting prejudice.

The judgments of conviction are

AFFIRMED.

## APPENDIX B

[TITLE OMITTED]

**No. 29200**

**ON PETITION FOR REHEARING**

Before BELL, THORNBERRY and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Martin Sklaroff in the above entitled and numbered cause be and the same is hereby DENIED.

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No. 71-724

# In the Supreme Court of the United States

OCTOBER TERM, 1971

MARTIN SKLAROFF, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

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*v.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Florida, petitioner and one Kane were convicted of having used interstate facilities to carry on an illegal gambling business, in violation of 18 U.S.C. 1952, and of having conspired to violate that statute and 18 U.S.C. 1084 (punishing transmission of wagers by a wire facility in interstate commerce), in violation of 18 U.S.C. 371. Petitioner was sentenced to concurrent prison terms of two years. The court of appeals affirmed (Pet. App. A 1-17).



452-194—71——1

Petitioner contends that the trial court erred in receiving into evidence certain items (see Pet. 5) which had been obtained pursuant to search warrants issued with respect to violations of the wagering tax statutes. Subsequent to the search, this Court held that the timely claim of the privilege against self-incrimination was a complete defense to a prosecution for failure to comply with those statutes. See *Marchetti* v. *United States*, 390 U.S. 39 and *Grosso* v. *United States*, 390 U.S. 62. In this case, the court of appeals sustained the admissibility of the seized items (Pet. App. A 16–17), relying upon its opinion in *United States* v. *Scaglione*, 446 F. 2d 182 (C.A. 5), certiorari denied, November 9, 1971 (No. 71–370), holding that *Marchetti* and *Grosso* do not retroactively invalidate search warrants issued for violations of these provisions. The ruling below is in accord with the decisions of all the federal courts of appeals which have been confronted with the issue. The cases hold that in prosecutions other than for violation of the wagering tax statutes, evidence obtained under search warrants based on wagering tax violations prior to *Marchetti* and *Grosso* is admissible, since the wagering tax statutes are not invalid and, when made, the searches were clearly lawful under then settled law. *Eg., United States* v. *Armiento*, 445 F. 2d 869 (C.A. 2) and cases cited, certiorari denied, *sub nom. Jernek* v. *United States*, October 12, 1971 (No. 71–72); *United States* v. *Hanon*, 428 F. 2d 101

(C.A. 8) (*en banc*), certiorari denied, 402 U.S. 952;[1] see *Mackey* v. *United States*, 401 U.S. 667 (opinion of Mr. Justice White).

Petitioner's contention that the trial judge erred in the manner in which he conducted the hearing on remand to determine whether the conviction had been tainted by illegal electronic surveillance is thoroughly answered in the opinion below upon which we rely (Pet. App. A 1–10).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

DECEMBER 1971.

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[1] Petitioner's reliance (Pet. 7) on *United States* v. *Lookretis*, 398 F. 2d 64 (C.A. 7) is misplaced. That case did not involve a challenge to a search warrant but to the introduction of evidence from the wagering tax form in a proceeding under other statutes dealing with interstate gambling. Moreover, *Lookretis* has seemingly been superseded by the Seventh Circuit in *Zizzo* v. *United States*, 447 F. 2d 857 (C.A. 7), petition for a writ of certiorari pending, No. 71–594, this Term. Here, as the court of appeals pointed out (Pet. App. A 16–17), no similar evidence was introduced; rather in addition to the items seized under the warrant the government introduced petitioner's *income tax* returns—which hardly can be said to have been coerced in violation of the Fifth Amendment privilege, *United States* v. *Sullivan*, 274 U.S. 259—to show that a major source of petitioner's income came from gambling.

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# In the Supreme Court of the United States

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## No. 71-724

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MARTIN SKLAROFF,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

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## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4653 — 377-3721

in the

# Supreme Court

of the

# United States

OCTOBER TERM, 1971

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NO. 71-724

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MARTIN SKLAROFF,

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*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

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## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In accordance with Rule 24(5) of the Rules of Practice of the United States Supreme Court, the Petitioner, MARTIN SKLAROFF, filed this Supplemental Brief respectfully directing the Court's attention to the following cases:

In *Hill v. Philpott*, 445 F.2d. 444 (7th Cir., 1971), cert. denied 40 LW 3279 (Dec. 14, 1971), and in *United States v. Blank*, 330 F.Supp. 783 (N.D.Ohio, 1971), the Courts ruled that evidence seized pursuant to a valid search warrant and thus admissible under the Fourth Amendment was nonetheless inadmissible on the basis of the Fifth Amendment's privilege against self-incrimination.

*Hill v. Philpott, supra*, held that where the production of a taxpayers personal books and records could not be compelled by subpoena or summons on the basis of the Fifth Amendment privilege against self-incrimination, the fact that they were seized pursuant to a valid search warrant did not preclude the taxpayer from claiming violation of his Fifth Amendment rights and thus the material seized under the warrant would be inadmissible. In *Hill v. Philpott, supra*, the evidence in question consisted of personal books and records evidencing a violation of the tax laws. In *United States v. Blank, supra*, the court relied on the decision in *Hill v. Philpott, supra*, and held that in view of *Marchetti v. United States*, 390 U.S. 39 (1968) and *Grosso v. United States*, 390 U.S. 62 (1968), *records of alleged bookmaking activities*, which were per se self-incriminatory and which were validly seized pursuant to a search warrant could not be used against a defendant who asserted his personal claim of privilege against self-incrimination under the Fifth Amendment.

The Petitioner submits that the above cases are of substantial importance to the determination of the issues in the instant case. It is the Petitioner's contention that even if the evidence obtained herein was obtained by a valid

warrant it nonetheless is evidence which violated his Fifth Amendment rights against self-incrimination and as such should not have been admitted against him at trial.

It is therefore respectfully submitted that in view of the reasons set forth in the Petitioner's Petition for a Writ of Certiorari, and the cases cited herein, a Writ of Certiorari should issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of December, 1971, a copy of the above Supplemental Brief in Support of Petition for Writ of Certiorari was mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. and to Robert W. Rust, Office of the United States Attorney, Miami, Florida.

I FURTHER CERTIFY that all parties required to be served have been served.

JAMES J. HOGAN